INTERIOR BOARD OF INDIAN APPEALS

Rose Evans v. Sacramento Area Director, Bureau of Indian Affairs

28 IBIA 124 (08/01/1995)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ROSE EVANS
v.
SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 95-54-A Decided August 1, 1995

Appeal from the denial of a request for a homesite lease.

Affirmed.

1. Bureau of Indian Affairs: Administrative Appeals: Generally--Indians: Generally

   Regulations in 25 CFR 2.12 and 43 CFR 4.332 require the Bureau of Indian Affairs to assist an Indian or Indian tribal appellant not represented by counsel in regard to an appeal. This assistance consists of serving the appellant's filings on interested parties and allowing access to Government records and other documents. It does not include obtaining an attorney for the appellant or acting as the appellant's attorney by preparing the appellant's appeal documents or otherwise advising the appellant on the merits of the appeal.

APPEARANCES: Rose Evans, pro se.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Rose Evans seeks review of a September 27, 1994, decision issued by the Sacramento Area Director, Bureau of Indian Affairs (Area Director; BIA), denying her request for a homesite lease on an allotment in which she owns an undivided interest. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

Appellant is 1 of 36 co-owners of the John Green Allotment, I.H. 2300, located in Shasta County, California. Appellant owns a 1440/12960 interest in the allotment. The entire allotment covers 40 acres, more or less. The homesite lease appellant sought would have covered approximately 1.5 acres. Appellant apparently requested the lease in order to be able to apply for Housing Improvement Program funds to rebuild a house that burned in 1991.

The Superintendent, Northern California Agency, BIA (Superintendent), wrote to each of the co-owners of Allotment I.H. 2300, advising them of the request and asking for a response as to whether or not they would agree to the lease. One co-owner was deceased. The letters to 13 co-owners were returned by the U.S. Postal Service as undeliverable; 10 co-owners did not respond; another 10 co-owners opposed a lease to appellant; and 1 co-owner supported the request.

By letter dated July 8, 1994, the Superintendent denied appellant's request, stating:

> This decision is rendered due to the negative responses we have received from the other heirs, devisees and lack of responses, and coupled with the fact that we have just recently been notified from the Sacramento Area Office that there is an archaeological site at the location you picked as your preferred location.
>
> * * * * * *
>
> At this time, there are two options you may want to consider and to pursue in this matter. (1) You may want to try to contact the other heirs and seek their approval for your homesite, and (2) there will need to be a new location for your homesite, if you are going to pursue this.

Appellant appealed to the Area Director, who affirmed the Superintendent's decision on September 27, 1994. The Area Director stated that his decision was "based on the findings in the letter to you from the Agency Superintendent dated July 8, 1994." He added that the need to select a new location because of the presence of an archaeological site resulted from the requirements of the National Environmental Policy Act, 42 U.S.C. §§ 4321 et. seq. (1988).

Appellant appealed to the Assistant Secretary - Indian Affairs based on the instructions given in the Area Director's decision. By memorandum dated December 1, 1994, the Assistant Secretary referred the appeal to the Board.

Appellant's notice of appeal states:

> (1) In my original appeal letter, I requested technical assistance with my appeal * * *. I never received any type of assistance from the BIA. Because I was entitled to receive assistance, but was not offered any assistance, I believe a denial of my appeal was wrong.
>
> (2) If my home-site application was denied because of an archeological site, I request assistance from the BIA to help me find an acceptable alternative site within the same area.
>
> (3) If my home-site application was denied for any reasons other than the archeological site, I request assistance

> in explaining exactly what other obstacles exist to my home-site application. [Emphasis in original.]

After receiving the administrative record, the Board established a briefing schedule, and included a copy of its appeal regulations for appellant's use. Based on the date of her receipt of the Board's order, appellant's opening brief was due on or before March 20, 1995.

On April 7, 1995, the Board received a request for an extension of time to file an opening brief. The request, which was filed for appellant by an attorney, stated that the Superintendent did not oppose the request. The certificate of service showed service on only the Superintendent.

In an order dated April 7, 1995, the Board noted that appellant's request for an extension of time would ordinarily not be considered because it was mailed after the due date for the brief, in violation of 43 CFR 4.310(d)(2); that the Superintendent's decision was not the decision under appeal, so that his concurrence in the request was not relevant; and that appellant had failed to serve other interested parties. The order ended: "[T]he Board declines to grant an extension of time without proof that appellant has properly served her request for an extension on all of the interested parties listed on the attached distribution list, and proof that none of those parties object to an extension."

On May 30, 1995, the Board received an opening brief for appellant from the same attorney who had filed the request for an extension of time. Although the opening brief was served on the interested parties listed on the Board's notice of docketing distribution list, there was no proof that the request for extension of time had been served on those parties; no proof that those parties did not object to the extension of time; and no explanation as to why appellant believed she was entitled to file an opening brief without first complying with the Board's April 7, 1995, order.

Under these circumstances, the Board declines to consider appellant's late-filed opening brief.

Discussion and Conclusions

This case is governed by 25 CFR 162.2, which sets forth those circumstances under which BIA may grant a lease of individually owned trust land on behalf of the trust owner without the owner's consent. Section 162.2 states:

> (a) The Secretary may grant leases on individually owned land on behalf of: (1) Persons who are non compos mentis; (2) orphaned minors; (3) the undetermined heirs of a decedent's estate; (4) the heirs or devisees to individually owned land who have not been able to agree upon a lease during the three-month period immediately following the date on which a lease may be entered into; provided, that the land is not in use by any of the heirs or devisees; and (5) Indians who have

given the Secretary written authority to execute leases on their behalf.

> (b) The Secretary may grant leases on the individually owned land of an adult Indian whose whereabouts is unknown, on such terms as are necessary to protect and preserve the property. [Emphasis added.]

For the purposes of this discussion, the Board assumes, without further analysis, that BIA has authority under 25 CFR 162.2 to grant a lease on behalf of some or all of those co-owners who did not respond to the Superintendent's inquiry letter. Section 162.2, however, clearly grants BIA discretion in deciding whether or not to grant a lease on behalf of a member of one of the listed classes of owners. In exercising its discretionary authority, BIA must act in what it perceives to be the best interests of those trust owners, and with due regard to its trust responsibility to them.

The Board has previously held that an appellant who challenges a BIA discretionary decision bears the burden of showing that the official did not properly exercise discretion. See, e.g., Sault Ste. Marie Tribe of Indians v. Minneapolis Area Director, 25 IBIA 236 (1994); Ross v. Acting Muskogee Area Director, 21 IBIA 251 (1992). Accordingly, appellant bears the burden of proving that the Area Director did not properly exercise his discretion in determining whether or not to grant a lease on behalf of those co-owners falling within section 162.2.

[1] Appellant's first argument is based on her allegation that she did not receive "technical assistance" with her appeal, and her apparent conclusion that therefore the Area Director could not deny her application. The Board does not know what "technical assistance" appellant believes BIA should have provided. Under 25 CFR 2.12(c), when an appellant is an Indian or Indian tribe not represented by counsel, the official with whom the appeal is filed is required to assist in the distribution of the appellant's filings. Similarly, under 43 CFR 4.332(c), when the appellant is an Indian or Indian tribe not represented by counsel who requests assistance from BIA, the BIA deciding official is required to "render such assistance as is appropriate in the preparation of the appeal." The Board has stated that these regulations require BIA to serve appeal documents and allow access to Government records and documents, but do not require BIA to obtain an attorney for the appellant, or to act as the appellant's attorney by preparing the appellant's appeal documents or otherwise advising the appellant on the merits of the appeal.

Appellant has not alleged that BIA, upon request, failed to serve her appeal documents or allow her access to Government records and documents. An appellant who does not allege error has not carried her burden of proof.

Both the Area Director and the Superintendent indicated that the archaeological problem could have been resolved if it were the only problem. The decisions show that the real problem was that 10 of the 11 co-owners

responding to the Superintendent's letter opposed appellant's request. The administrative record further reveals that most of the co-owners opposing the lease made extremely strong negative statements explaining their opposition.

Again, appellant does not allege any error in the Area Director's decision, but instead requests assistance in identifying, and presumably removing, all obstacles to her obtaining the lease. The Superintendent's July 8, 1994, decision letter suggested what appellant needed to do: "Contact the other heirs and seek their approval for your homesite." Appellant's request for assistance in identifying obstacles to her lease does not carry her burden of showing that the Area Director's decision was in error.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Sacramento Area Director's September 27, 1994, decision is affirmed. 1/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

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1/ This opinion does not restrict appellant's right to continue to seek the agreement of her co-owners to her request.